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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1949

NO. 151

HENRY BEHRENS, Petitioner,

v.

J. SCOTT SKELLY, CHARLES E. DEXTER, JR., MARC J. SANDLER, CLARENCE O. DEVORE, LIGGETT SPRING AND AXLE COMPANY and AXELTON WATER COMPANY, Respondents.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

*TO The Honorable Fred M. Vinson, The Chief Justice Of The United States, And The Associate Justices Of The Supreme Court Of The United States:*

Henry Behrens, the above named petitioner, respectfully prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Third Circuit, entered on March 16, 1949 (146a), affirming the judgment order of the District Court of the United States for the Western District of Pennsylvania, entered March 5, 1948 (136a), sustaining respondents' (defendants') motion for judgment on the pleadings (95a), on the ground that petitioner (plaintiff) was barred by *res judicata* from prosecuting the action.

## OPINIONS BELOW.

The opinion of the United States District Court for the Western District of Pennsylvania, dated March 1, 1948, is reported in 76 F. Supp. 75 and is found at page 123a of the Appendix. The opinion of the United States Court of Appeals for the Third Circuit, dated March 16, 1949, is reported in 173 F. 2d 715 and is found at page 138a of the Appendix.

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## JURISDICTION.

Jurisdiction to issue the writ is found in the provisions of Title 28, United States Code, section 1254.

The judgment of the Circuit Court of Appeals was entered on March 16, 1949 (146a), and the petition for rehearing was denied on April 4, 1949 (157a).

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## QUESTIONS PRESENTED.

### Question 1.

Did the Circuit Court of Appeals rightly decide that there was privity, for purposes of *res judicata,* between the defendants in the instant suit and respondents in an arbitration proceeding in New York, the question of privity being dependent upon New York law?

(a) Is the doctrine of *lis pendens* (upon which the Circuit Court predicated privity) applicable to a suit against the transferor of personalty, for money damages only, the possession of the personalty itself being in no wise involved therein?

(b) Assuming an affirmative answer to (a), is a transferee who takes prior to the commence-

ment of an arbitration proceeding between his transferor and a third party, but subsequent to the special statutory proceeding whereby the third party compelled arbitration, entitled to the benefit of an award of the arbitrators in favor of his transferor, as *res judicata,* in a subsequent suit brought by the third party against the transferee?

**Question 2.**

Assuming an affirmative answer to Question 1, would not a Pennsylvania court, under the principles set forth in *Bigelow v. Old Dominion Copper Co.,* 1912, 225 U.S. 111, refuse to allow a transferee the benefit of a judgment in favor of his transferor where they are joint tort-feasors?

**Question 3.**

Recognizing that *res judicata* applies to jurisdictional questions, where, in an arbitration proceeding, (a) a defense is urged which is beyond the jurisdiction of the arbitrators, (b) eighty per cent or more of the evidence presented is directed to such defense, (c) the highest court of the state declares that the record is silent, and that it has made no attempt to speculate, as to whether the award was based on a competent ground,— may the award of the arbitrators be relied upon as *res judicata* in a subsequent suit in a Federal court without a showing that it was bottomed on a defense which is within the competence of the arbitrators?

And particularly when the parties to the subsequent suit are not identical with the parties to the arbitration and privity is lacking?

## STATEMENT OF THE CASE.

This is an action for the restitution of shares of stock and other property belonging to petitioner, (plaintiff-appellant below), the possession and indicia of ownership of which were secured by respondents, (defendants-appellees below), as the fruits of a conspiracy (to defraud petitioner), engaged in by the respondents in combination with one Gertrud Feuerring and one Alfred Schwabacher and other unknown parties; for an accounting of the avails thereof and for compensatory and exemplary damages (4a-40a).

In October, 1941, Feuerring and Schwabacher, quota immigrants in the United States and residents of the State of New York, took title to all of the capital stock of Liggett Spring & Axle Company and Axelton Water Company, both Pennsylvania corporations and defendants to this action, and certain obligations of Liggett having a face value in excess of $300,000.00 (hereinafter for convenience collectively called the "acquisition"). The acquisition resulted from prolonged negotiations with the prior owner, initiated and, for the most part, carried on by petitioner, likewise a quota immigrant and resident of the State of New York. Feuerring and Schwabacher were admitted to the venture at their request, and title to the acquisition was taken in their names on behalf of and in trust for themselves and petitioner (4a-10a).

On November 12, 1941, petitioner, on the one part, entered into an agreement (31a) in the German language, with Feuerring and Schwabacher, collectively, on the other part, defining their respective rights and interests in the acquisition. The agreement provides that

petitioner had an outright interest in 10% of the acquisition, an option to purchase an additional 10% thereof, and the first refusal of the collective participation of Feuerring and Schwabacher therein in the event they desired to sell (11a-12a, 34a); it also contained an arbitration clause (37a). On December 29, 1941, Feuerring and Schwabacher repudiated the agreement by a letter to petitioner (12a-13a, 39a).

In January, 1942, (90a) petitioner demanded arbitration pursuant to the agreement, which was refused by Feuerring and Schwabacher. On March 26, 1942, (39a-40a) petitioner notified Feuerring and Schwabacher that he elected to exercise his option to purchase the additional 10% of the acquisition and to exercise all of his rights under the agreement of November 12, 1941. On June 15, 1942, petitioner notified all of the respondents and others of his right, title and interest in the acquisition (17a, 40a-42a).

On December 10, 1942, petitioner petitioned the Supreme Court of New York for an order to compel arbitration (57a). Pending the determination of this petition, on or about January 14, 1943, Feuerring and Schwabacher in furtherance of a conspiracy between them and the instant respondents (and others) to defraud petitioner of his interest and rights therein secretly caused the indicia of ownership of the shares of stock and other property comprising the acquisition to be purportedly transferred, through a straw man, to the respondents (17a-18a).

On March 1, 1943, the petition for an order directing arbitration was granted (57a). On November 5, 1943, the arbitration proceeding was commenced by a letter from petitioner's attorney to the American Arbitration

Association (60a-64a). Eighty per cent, at least, of the content of the defense and argument of counsel, before the arbitrators, was directed to fraud in the inducement, twenty per cent or less to *force majeur* (104a). On April 26, 1944, the arbitrators made the following award:

> "The claim of Henry Behrens against Gertrud Feuerring and Alfred Schwabacher for damages for breach of contract is not sustained, and is disallowed." (67a),

which was confirmed, on June 27, 1944, by the Supreme Court of New York (68a). Judgment was entered thereon June 30, 1944 (72a), which was affirmed by the Appellate Division of the Supreme Court on October 25, 1945 (88a), without opinion. The Court of Appeals of New York affirmed by opinion (90a) handed down January 17, 1947, and judgment was entered thereon (74a).

On February 7, 1947, petitioner commenced the present suit in the District Court for the Western District of Pennsylvania (1a). On March 3, 1947, respondents answered (42a, 78a) setting up the affirmative defense of *res judicata* based upon the arbitration award as affirmed.

On or about April 25, 1947, petitioner filed a notice of motion (97a) for reargument in the New York Court of Appeals, and by annexed affidavit of counsel (100a) directed the attention of that court to the instant action and the defense of *res judicata* therein raised. Petitioner's brief (102a) in support of his motion specifically requested (at 108a-109a) that court to clarify its holding, and a letter dated May 7, 1947 (109a), directed by petitioner's counsel to the Chief Judge of that court, reiterated the request, "so that the court in Pittsburgh

might know what effect is to be given to the New York judgment" (at 111a).

In denying the petition for reargument the New York Court of Appeals handed down a supplemental opinion (94a) on May 22, 1947, which declared:

> "The record herein was silent as to the basis of the arbitrators' award. This Court, by its decision, made no attempt to speculate as to that matter, but held that since the award might have rested on a ground which the arbitrators were competent to consider, other than that of fraud, there was 'no warrant for an inference of usurpation of power by them or other abuse of their office.'"

On October 24, 1947, the instant defendants moved, in the District Court, for judgment on the pleadings on the ground of *res judicata* (95a), which motion was granted on March 5, 1948 (136a) in accordance with an opinion (123a) filed March 1, 1948.

On March 16, 1949, the Court of Appeals for the Third Circuit affirmed in an opinion written by Judge Maris. A petition for rehearing was filed on March 30, 1949 (148a), which was denied on April 4, 1949 (157a).

## REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

The prevention of the improper application of *res judicata* as a defense is of the highest importance in the administration of justice. The decision of the Circuit Court of Appeals, sustaining the defense, deprived petitioner of his right to a "day in court".

On the important question of privity the decision below was not only contrary to general law but it violated the provisions of Title 28, United States Code, section 1652, in not recognizing the controlling local law in *both* New York, where the judgment relied upon was rendered, and in Pennsylvania, where the New York judgment was pleaded as an estoppel.

It is also of utmost importance that this Court declare that, although *res judicata* applies to a jurisdictional question, categorical adherence to the technical rules of the doctrine must give way to the equities in any case where such equities are against the application of the doctrine.

### I.

The court below recognized that privity was essential to the defense of *res judicata* in this case and that the law of New York, the state in which the judgment relied upon as an estoppel was rendered, controls the question of privity.

However, in New York, the doctrine of *lis pendens,* upon which the court below relied for its finding of privity, is not applicable to a suit which is directed only at the recovery of damages. *Hailey v. Ano,* 1893, 136

N.Y. 569, 32 N.E. 1068. The arbitration proceeding to which the court below applied *lis pendens* was directed only at the recovery of damages.

The court below gave no authority for its application of the doctrine; nor could it have been relying upon general law which is in accord with the New York law. 54 *C. J. S.* 577 (1948); 34 *Am. Jur.* pp. 377, 379-380 (1941).

The question of the application of *lis pendens* was not raised by counsel for either side in either the District Court or the Circuit Court and was first adverted to in this cause in the opinion of the Circuit Court (141a-143a). The inapplicability of the doctrine was advanced by petitioner in his petition for a rehearing before the Circuit Court, which was denied without opinion (157a).

II.

Assuming that *lis pendens* does apply, to establish privity the succession of interest must have occurred subsequent to the commencement—at the very least—of the prior litigation.

The court below predicated its finding that the instant respondents are privies to the New York respondents on a holding that the special proceeding to compel arbitration was part and parcel of the arbitration itself (142a-143a), which is directly contrary to New York law. *Marchant v. Mead-Morrison Mfg. Co.*, 1929, 252 N. Y. 284, 169 N. E. 386 (Cardozo, J.). The rejection by the court below of the law set forth in the *Marchant* case, *supra*, on the ground that the question of privity was not there in focus (142a) disregards, and is in conflict with, what appears to be the only New York case in which the

question of the separability of preliminary proceedings and subsequent proceedings on the merits for the purpose of determining privity on a plea of *res judicata* was directly in focus, *Matter of Commercial Casualty Insurance Company,* 1939, 257 App. Div. 536, 13 N.Y.S. 2d 754, reargument denied, 1939, 14 N.Y.S. 2d 807, appeal denied, 1939, 281 N.Y. 885.

III.

Assuming the correctness of the Circuit Court's decision that a New York court would find privity between the instant respondents and the New York respondents, the court below erred in not recognizing that a Pennsylvania court would refuse to recognize any privity between them because they are joint tort-feasors. *Betcher v. McChesney,* 1917, 255 Pa. 394, 100 Atl. 124; *Hornstein v. Kramer Bros. Freight Lines,* 1943, 3 Cir., 133 F. 2d 143.

It is settled law, through this Court, that a Pennsylvania court may do so. *Bigelow v. Old Dominion Copper Co.,* 1912, 225 U.S. 111, 32 S. Ct. 641, 56 L. Ed. 1009.

The Circuit Court summarily ignored the basic Pennsylvania law that joint tort-feasors are not in privity on the authority of *Marsh v. Pier,* 1833, 4 Rawle (Pa.) 273, a case which did not involve joint tort-feasors.

IV.

*Res Judicata* is an affirmative defense. Although ordinarily the introduction of a judgment is *prima facie* evidence that it was rendered by a tribunal with competence to consider the subject matter, under the circumstances in this case the defendants were bound to prove

that the award, of the arbitrators upon which the judgment was predicated, was bottomed upon a defense within the competence of the arbitrators.

**Conclusion.**

Wherefore, it is respectfully submitted that this petition for a writ of certiorari to review the judgment or decree of the Circuit Court of Appeals for the Third Circuit should be granted.

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## BRIEF IN SUPPORT OF PETITION.

### I.

**The Doctrine of Lis Pendens, on Which the Circuit Court Based Its Conclusion of Privity, Is Not Applicable in the Instant Case Because the Arbitration Proceeding Was Directed Only at the Recovery of Damages.**

The court below based its finding of privity, (and consequently sustained the defense of *res judicata*), on the doctrine of *lis pendens* (140a-143a), as appears from the following statement extracted from its opinion (142a):

> "* * * those who acquire interests pendente lite in property in litigation are in privity with the litigant from whom they acquire the property and as such are bound by, or entitled to the benefit of, the judgment subsequently entered."

Under the common law doctrine of *lis pendens*, "if no specific property is effected by the proceeding, there is nothing to which the doctrine can be applied, though the cause of action may have arisen out of a matter involving property." 34 *Am. Jur.* sec. 21, p. 379 (1941). "* * * It is not sufficient that title or right of possession of property may be incidentally effected." *Id.*, p. 380, footnote 9. This doctrine encompasses a suit for damages. *Id.* See also, 34 *Am. Jur.* p. 377 and 54 *C. J. S.* 577 (1948).

New York law is in accord, as illustrated by *Hailey v. Ano*, 1893, 136 N. Y. 569, 32 N. E. 1069, the leading case in point.

In that case a grant from X to the defendant was made while a suit in trespass (in which the issue was title) was pending by the plaintiff against X. The plaintiff recovered a judgment against X and contended that it was binding on the defendant in a subsequent suit by the plaintiff against the defendant for an alleged trespass by the defendant on the *same* property.

The New York Court of Appeals in declaring that the judgment was not *res judicata* said, (at page 577 of 136 N. Y.):

> "* * * the pendency of a trespass suit does not prevent a purchase of the land upon which the trespass was committed *pendente lite,* or give to a judgment for damages subsequently recovered therein the effect of an adjudication binding the title of such intermediate purchaser, even though he may have known that the action was for a trespass upon the land purchased."

Clearly, therefore, *lis pendens* does not apply to the transfer which occurred in this case. The arbitration proceeding was for the recovery of damages only, as recognized by the Circuit Court (144a), and not to recover property or to determine any right or interest in property *per se.*

In fact, as pointed out in *Hailey v. Ano, supra,* even actual knowledge, as opposed to constructive knowledge through *lis pendens,* would not result in privity. The reason, of course, is that the property which is transferred must be the subject of the suit.

## II.

**Even Assuming Lis Pendens to Be Applicable, There Is No Privity Since, Under New York Law, the Succession of Interest Occurred Before the Commencement of the Prior Applicable Litigation and Not Subsequent Thereto.**

In New York, for purposes of privity, as well as for purposes of review, a proceeding to compel arbirtration and the ensuing arbitration are separate controversies.

Judge Cardozo, in *Marchant v. Mead-Morrison Manufacturing Co.*, 1929, 252 N.Y. 284, 169 N.E. 386, said:

> "An order for the specific performance of an agreement to arbitrate a controversy is one that finally determines a special proceeding (cases cited). *The proceeding thus ended is not a part of the arbitration that is thereby set in motion.* It is subject to direct review as a separable controversy." (Emphasis our own)

The court below refused to recognize the decision in the *Marchant* case as controlling on the ground that it is applicable only to the question of review; and concluded that a New York court would decide that the two distinct proceedings are inseparable for purposes of privity (142a-143a). The error in this conclusion is demonstrated by the New York case of *Matter of Commercial Casualty Insurance Company,* 1939, 257 App. Div. 536, 13 N.Y.S. 2d 754, reargument denied, 1939, 14 N.Y.S. 2d 807, appeal denied, 1939, 281 N.Y. 885, which was ignored by the Circuit Court although it appears to be the only New York decision directly in point. Simply stated, the facts in that case were as follows:

McElligott sued in the N.Y. Court of Claims for damages and in his complaint referred to an assignment of his claim to the Casualty Co. which later intervened. (First proceeding.)

*After the commencement of the proceeding,* McElligott made partial assignments of his claim to other assignees.

Judgment in the Court of Claims was entered for both McElligott and the Casualty Co., as their interests might appear.

The Casualty Co. then sued McElligott to determine their respective interests, and secured a judgment. (Second proceeding).

When the Casualty Co. subsequently sued the Comptroller of New York for the amount of that judgment the other assignees intervened. The Casualty Co. contended that these assignees were privy to McElligott and concluded by the judgment entered in the second proceeding on the ground that the first and second proceedings were inseparable for purposes of privity.

The New York Supreme Court, Appellate Division, held that the proceedings were distinct and separate, advancing reasons in support of its ruling which are equally applicable to the instant case, (at pages 538-539 of 257 App. Div.):

"The proceeding in the Court of Claims was merely to determine whether or not the claim had merit. The court had no authority to determine the nature or extent of petitioner's interest in that claim nor did it attempt to do so. It merely found that McElligott had made an assignment to peti-

tioner. The extent of petitioner's interest in that claim was not determined until the rendition of the judgment in its favor (in the action by the Casualty Co. against McElligott—the second proceeding). Long before that action was commenced the various other assignments of the same claim made by McElligott to the intervening defendants (subsequent assignees) had been executed and filed—" (Matter in parenthesis our own.)

In view of the above cited decision of the New York courts it is, we submit, beyond question that the court below erred in finding that the courts of New York would hold that the proceeding whereby petitioner compelled Feuerring and Schwabacher to engage in an arbitration proceeding was inseparable from the ensuing latter proceeding and concluding, from that false premise, that under the law of New York the instant respondents are in privity with Feuerring and Schwabacher (142a-143a).

## III.

**Assuming Privity Under New York Law, a Pennsylvania Court, Under the Doctrine of Bigelow v. Old Dominion Copper Co., 225 U.S. 111, Would Hold That Respondents, Being Joint Tortfeasors With Their Transferors Who Were Parties to the Arbitration, Could Not Avail Themselves of the Award in Favor of Their Transferors.**

The court below found (143a) that the Pennsylvania law is in agreement with the New York law of privity and, consequently, that the rule of the *Bigelow* case is inapplicable herein. We submit that the court

below misunderstood the Pennsylvania law. There can be no question that in Pennsylvania joint tortfeasors are *not* in privity with each other. This rule was declared in *Betcher v McChesney,* 1917, 255 Pa. 394, 100 Atl. 124, and has been followed consistently in Pennsylvania by both the state and federal courts. *Hornstein v. Kramer Bros. Freight Lines, Inc., et al.,* 1943, 3 Cir., 133 F. 2d 143. The general rule is the same. *Bigelow v. Old Dominion Copper Co., supra,* at page 129.

The court below dismissed this line of cases upon the authority of *Marsh v. Pier,* 1833, 4 Rawle (Pa.) 273. *Marsh v. Pier,* was decided long before *Betcher v. McChesney, supra,* and in no wise involves privity as between joint tort-feasors, joint liability having been neither alleged nor considered therein. There the court simply laid down the general rule that *privies* are entitled to the benefit of a judgment in favor of their transferors and that there is privity even though the first judgment may not have been rendered until the second action was pending.

The complaint herein alleges a conspiracy between and among the instant respondents and the New York respondents, Feuerring and Schwabacher, to defraud petitioner (17a-18a). The instant respondents having moved for judgment on the pleadings (95a) concede that they are joint tort-feasors with the New York respondents. *National Metropolitan Bank v. U.S.,* 1945, 323 U.S. 454, 65 S. Ct. 354, 89 L. Ed. 383. Consequently, whatever may be the New York law as to privity, we submit that a Pennsylvania court, under the authority of the rule in the *Bigelow* case, would, contrary to the decision of the court below, refuse recognition to respondents' plea of *res judicata.*

## IV.

**Moreover, the Defense of Res Judicata Should Have Been Disallowed Because the Record Does Not Show That the Judgment Relied Upon Was Based on a Ground Within the Competence of the Arbitrators.**

A. *Respondents Were Unable to Show That The Award Was Based on a Ground Within The Competence of The Arbitrators.*

The two major defenses relied upon by Feuerring and Schwabacher before the arbitrators were (1) fraud in the inducement of the agreement of November 12, 1941 (which contained the arbitration clause), and (2) frustration by *force majeur*. Respondents argued in their brief below that "Eighty per cent, at least, of the content of the defense and arguments of counsel (before the arbitrators) was directed to fraud in the inducement, 20 per cent or less to frustration * * *". The record supports their argument (104a).

Under New York law there can be no question that fraud in the inducement is not cognizable by arbitrators. *Matter of Lipman v. Haeuser Shellac Co.*, 1942, 289 N.Y. 76, 43 N.E. 2d 817; *Matter of Aqua v. H. Warshaw & Sons, Inc.*, 1943, 179 N.Y. Misc. 949, affirmed without opinion 266 App. Div. 718, appeal denied, 290 N.Y. 929. Semble, the defense of frustration is likewise beyond the jurisdiction of arbitrators. *Matter of Kramer v. Uchitelle, Inc.*, 1942, 288 N. Y. 467, 43 N.E. 2d 493. If the award, therefore, was based upon the ground of fraud in the inducement, it was void, since a judgment is void if it is not rendered by a court with competency of the subject matter. *Robertson v. Gordon*, 1912, 226 U.S.

311, 33 Sup. Ct. 105, 57 L. Ed. 236. See also, *Restatement, Judgments,* section 7 (1942).

Clearly, if only an invalid defense had been presented the award would have been void. If, in fact, a defense beyond the arbitrators' competence bottomed the award, respondents here should not be in a better position simply because their transferors also set forth a valid defense.

Under any theory of presumptions or burden of proof the court below erred in sustaining respondents' plea of *res judicata.* Where a judgment appears to be that of a court of general jurisdiction, jurisdiction over the subject matter is presumed unless the contrary is disclosed either by the record or by extrinsic evidence. *Milliken v. Meyer,* 1940, 311 U.S. 457, 61 S. Ct. 339, 85 L. Ed. 278, rehearing denied, 1941, 312 U.S. 712, 61 S. Ct. 548, 85 L. Ed. 1143; *Settlemier v. Sullivan,* 1878, 97 U.S. 444, 24 L. Ed. 1110.

Since arbitrators are not a court of general jurisdiction—and it is basically the arbitrators' award which is being pleaded as *res judicata* — the presumption does not operate in favor of their award. Even if we assume that the award is a judgment of a court of general jurisdiction because of the New York procedure whereby awards are confirmed by the courts, we submit that the record herein sufficiently discloses a lack of jurisdiction to place on respondents the burden of proving proper jurisdiction. The record discloses not only the possibility but the very great probability that the award was predicated on a non-competent ground, eighty per cent of the content of defense having been directed to fraud

in the inducement, twenty per cent or less to frustration (104a).

But even though the District Court and Circuit Court were of the opinion that the record of the New York judgment disclosed jurisdiction over the subject matter, petitioner should not have been foreclosed on the issue. He was entitled to an opportunity to prove the contrary.

Respondents' contention, which was adopted by the court below (145a), that the affirmance of the arbitrators' award by the New York Court of Appeals is *res judicata* of the jurisdictional issue ignores the realities of the instant case, and, unless this Court declares to the contrary, will stand as binding precedent for the proposition that the doctrine of *res judicata* must be applied indiscriminately whenever the technicalities will permit, without regard to the circumstances or equities in any given case.

B. *The Principle That Res Judicata Also Applies to Questions of Jurisdiction Is Not Applicable To The Instant Case.*

We are not unmindful of the law enunciated in the line of cases exemplified by *Forsythe v. Hammond,* 1896, 166 U.S. 506, 17 S. Ct. 665, 41 L. Ed. 1095, *American Surety Company v. Baldwin et al.,* 1932, 287 U.S. 156, 53 S. Ct. 98, 77 L. Ed. 231, and *Stoll v. Gottlieb,* 1938, 305 U.S. 165, 59 S. Ct. 134, 83 L. Ed. 104.

The instant case is distinguishable. Here the New York Court of Appeals was, contrary to the usual prac-

tice, confronted with the specific question of the extent of faith and credit it intended should be accorded to its judgment by the courts of another forum for purposes of *res judicata.*

On April 25, 1947, petitioner applied to the New York Court of Appeals for reargument (97a) supporting his application by an affidavit of counsel (100a) which specifically referred to this litigation and to respondent's plea of *res judicata* herein. Petitioner's attorney, prior to motion day, directed a letter (109a) to the Chief Judge of the New York court pointing out that the award as affirmed might be held *res judicata* in this action. Petitioner's brief in support of his application (102a-109a) was to the same effect.

The application, supporting brief, and counsel's letter were all directed at securing from that court a declaration as to the effect of the court's affirmance (90a) of the award: whether, for purposes of *res judicata,* it was intended as an affirmance of the jurisdiction of the arbitrators over subject matter not within their competence.

If the New York court of Appeals intended to affirm the award for all purposes there was no need for it to hand down the supplemental opinion (94a). Had such been the court's intention it would have been sufficient to have denied reargument, without more. We strongly urge that the supplemental opinion, taken with the circumstances which prompted it, indicates that the New York Court of Appeals deliberately intended thereby to relegate to any court in which the award might be pleaded as *res judicata* the decision as to what effect should be given the award.

The equities of the case favor such a conclusion. The rationale of the policy of *res judicata* is that one suit which gives a fair opportunity to determine the cause of action should be enough. But can it be said that a litigant has been given a fair opportunity to have his cause of action determined when the determination has been made on issues which are not cognizable by the tribunal considering them?

The equities in favor of petitioner are even stronger here where the respondents are not in privity with the defendants in the arbitration award. Here, co-conspirators are asking that petitioner be bound by a judgment which petitioner could not have invoked against respondents, and in addition, by a judgment the validity of which is in such doubt as to cause the New York Court of Appeals to bottom its affirmance (90a) upon the ground that the "record was silent as to the basis of the arbitrators' award" and the bare possibility that it "might have rested on a ground which the arbitrators were competent to consider" (93a, 94a).

C. *Compelling Respondents to Show a Competent Basis Does Not Deprive Them of the Benefits of the Award For Purposes Of Res Judicata Beyond The Question of Jurisdiction.*

We recognize the distinction between *res judicata* as a bar to an action and estoppel by verdict of a particular issue, and we concede that even if the arbitration award was based on an issue which would not decide the instant case, *if that issue were within the competence of the arbitrators,* all issues which might have been litigated and which would be decisive in the instant case would be foreclosed.

In short, we do not contend that respondents must show the basis of the award in order to show that it is decisive of the issues in this case. All petitioner asks is that respondents carry their burden of proof on the matter of competency and show that the issue bottoming the award was within the jurisdiction of the arbitrators.

Respectfully submitted,

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